No. 18-96

In the Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. Introduction 7

II. Policy Underlying the Challenged Statute. 8

III. The Congressional and Constitutional History of Liquor Regulation 23

A. The Eighteenth Amendment. 23

B. The Twenty-first Amendment 29

C. The Twenty-first Amendment and Dormant Commerce Clause. 32

IV. State Liquor Laws Structuring the Distribution System Within the State's Borders are Entitled to Extraordinary Deference Under the Twenty-first Amendment. 52

CONCLUSION 57

TABLE OF AUTHORITIES

Cases

44 Liquor Mart, Inc. v. Rhode Island,
517 U.S. 484 (1996).....34

Arnold's Wines, Inc. v. Boyle,
571 F.3d 185 (2d Cir. 2009).....*passim*

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984).....35, 36, 37, 39

Bowman v. Chi. & Nw. Ry. Co.,
125 U.S. 465 (1888).....25

Brooks v. Vassar,
462 F.3d 341 (4th Cir. 2006).....44, 46, 47

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476 U.S. 573 (1986).....35

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883 F.3d 608 (6th Cir. 2018).....1, 2, 6, 7

Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,
445 U.S. 97 (1980).....30

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984).....38

Clark Distilling Co. v. Western Maryland Railway Co., 242 U.S. 311 (1917) 27

Carter v. Virginia, 321 U.S. 131 (1944) 53

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Costco v. Hoen, 522 F.3d 874 (9th Cir. 2008) 54

Craig v. Boren, 429 U.S. 190 (1976) 34

Dugan v. Bridges, 16 F. Supp. 694 (D.N.H. 1936) 26, 27

Finch v. McKittrick, 305 U.S. 395 (1939), *abrogated by Granholm v. Heald*, 544 U.S. 460 (2005) 34

Granholm v. Heald, 544 U.S. 460 (2005) ..... *passim*

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Lebamoff Enterprises, Inc. v. Huskey,
666 F.3d 455 (7th.Cir. 2012).....54

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410 U.S. 356 (1973).....56

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135 U.S. 100 (1890).....24

Loretto Winery, Ltd. v. Gazzara,
601 F. Supp. 850 (S.D.N.Y. 1985) 28

North Dakota v. U.S.,
495 U.S. 423 (1990).....35, 37, 38

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170 U.S. 412 (1898).....25

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731 F.3d 799 (8th Cir. 2013).....*passim*

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324 U.S. 293 (1945).....31

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Case No. 1:16-cv-01483-EGS, Doc. 42
(D.D.C. October 22, 2018).....10

Wine Country Gift Baskets.com vs. Steen,
612 F.3d 809 (5th Cir. 2010).....51, 54

Wisconsin v. Constantineau,
400 U.S. 433 (1971).....34

Ziffrin, Inc. v. Reeves,
308 U.S. 132 (1939) 33

Constitutional Provisions

U.S. CONST. amend. I 34
U.S. CONST. amend. XVIII 9, 27
U.S. CONST. amend. XXI ..... *passim*
U.S. CONST. amend. XXI, § 2 ..... 30, 31, 40
U.S. CONST. amend. XXI, § 3 30

Statutes

235 Ill. Comp. Stat. Ann. § 5/6-8 13
237 Neb. Admin. Code Ch. 6, Sec. 010 13
27 U.S.C. § 201. 17
27 U.S.C. § 204 17
27 U.S.C. § 205 17
27 U.S.C. § 205(e) 17
3 R.I. Gen. Laws Ann. § 3-5-10(a)(1) 14
3 R.I. Gen. Laws Ann. § 3-5-10(b)(1) 16
42 U.S.C. § 290[illegible]-25b(b)(7) 17
47 Pa. Stat. Ann. § 4-431(c) 16
47 Pa. Stat. Ann. § 4-441(g) 13
47 Pa. Stat. Ann. § 4-410(d) 14
47 Pa. Stat. Ann. § 4-431(c) 14
7 VT Stat. § 63(b) 14

Ala. Code § 28-1-4(b) 13
Ala. Code § 28-3A-8 13
Ala. Code § 28-3A-9 13
Ariz. Rev. Stat. Ann. § 4-202 16
Ariz. Rev. Stat. Ann. § 4-243.01(B) 13
Ariz. Rev. Stat. Ann. § 4-402(A) 14
Ark. Code Ann. § 3-4-606(a) 14, 15
Ark. Code Ann. § 3-5-216 13
Cal. Bus. & Prof. Code § 24041 13
Colo. Rev. Stat. Ann. § 44-3-407(1)(d) 13
Conn. Agencies Regs. § 30-6-B9 13
Del. Code Ann. tit. 4, § 501(f) 13
Fla. Stat. Ann. § 561.5101 13
Haw. Rev. Stat. Ann. § 281-3 13
Idaho Code Ann. § 23-1028 13
Idaho Code Ann. § 23-304 14
Ind. Code Ann. § 7.1-3-3-5(b) 13
Iowa Code Ann. § 123.130(2) 13
Iowa Code Ann. § 123.3(34) 14, 15
Iowa Code Ann. § 123,127(2)(b) 14, 15
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Ky. Rev. Stat. Ann. § 243.100(1)(f) 14
Ky. Rev. Stat. Ann. § 244.167(1)(d) 13
La. Stat. Ann. § 26:359(A) 13
La. Stat. Ann. § 26:80(A)(2) 14

Mass. Gen. Laws Ann. Ch. 138, § 18 ..... 13, 14, 15
MD AL BEV § 3-102 ..... 14, 15
MD AL BEV § 3-105(b) 15
Md. Code Regs. § 03.02.01.20 13
Me. Rev. Stat. tit. 28A, § 1361(4) 13
Me. Rev. Stat. tit. 28-A, § 1401(5)(A) 14
Me. Rev. Stat. tit. 28-A, § 1401(5)(B) 15
Mich. Comp. Laws Ann. § 436.1601(1) 14, 15
Mich. Comp. Laws Ann. § 436.1601(4) 15
Minn. Stat. Ann. § 340A.305 13
Miss. Code Ann. § 27-71-349(6) 13
Miss. Code Ann. § 67-3-21 ..... 14, 15
Mo. Ann. Stat. § 311.060(1) 14
Mo. Ann. Stat. § 311.060(3) 15
Mo. Ann. Stat. § 311.373 13
Mont. Code Ann. § 16-3-230 13
N.C. Gen. Stat. Ann. § 18B-1113 13
N.C. Gen. Stat. Ann. § 18B-900(a)(2) 14
N.D. Admin. Code § 81-12-01-04 13
N.D. Cent. Code Ann. § 5-03-01(1) 14
N.D. Cent. Code Ann. § 5-03-01 16
N.H. Rev. Stat. Ann. § 178:1(III) 14, 15
N.H. Rev. Stat. Ann. § 178:16(I) 13
N.J. Admin. Code § 13:2-25.3 13
N.J. Stat. Ann. § 33:1-11.3 ..... 14, 15

N.M. Stat. Ann. § 60-6A-1(B) 13
N.M. Stat. Ann. § 60-6B-2(A)(3) 14, 16
Neb. Rev. Stat. Ann. § 53-125 ..... 14, 16
Nev. Rev. Stat. Ann. § 369.4855 13
Nev. Rev. Stat. Ann. § 369.487 13
Ohio Admin. Code § 4301:1-1-22(B) 13
Okla. Stat. Ann. tit. 37A, § 2-146(A)(1) 14, 15
Okla. Stat. Ann. tit. 37A, § 3-110(E) 13
R.I. Code R. § 11-4-8:4, Rule 19(b)(1) 13
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S.C. Code Ann. § 61-6-110(2) 14, 15, 16
S.D. Codified Laws § 35-4-60.1 13
Tenn. Code Ann. § 57-3-203 17
Tenn. Code Ann. § 57-3-203 (b)(1) 14, 15
Tenn. Code Ann. § 57-3-203(f) 16
Tenn. Code Ann. § 57-3-204 19
Tenn. Code Ann. § 57-3-204 (b) (4) 21
Tenn. Code Ann. § 57-5-201(c) 13
Tenn. Code Ann. § 57-3-102 20
Tenn. Code Ann. § 57-3-103 20
Tenn. Code Ann. § 57-3-202 18
Tenn. Code Ann. § 57-3-204 (b) 5
Tenn. Code Ann. § 57-3-301(b) 18
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Tenn. Code Ann., Title 57 16

Tex. Alco. Bev. Code Ann. § 107.06(b) 13-14
Tex. Alco. Bev. Code Ann. § 6.03(a) 14, 15
Tex. Alco. Bev. Code Ann. § 6.03(k) 16
Utah Code Ann. § 32B-13-301(9)(b)(ii) 14
Va. Code Ann. § 4.1-223(1) 14
Va. Code Ann. § 4.1-310 (2007) 46
W. Va. Code Ann. § 11-16-8(a) 14, 15, 16
Webb-Kenyon Act, 27 U.S.C. § 122 (1913) ..... *passim*
Wilson Act, 27 U.S.C. § 121 (1890) 25, 40
Wis. Stat. Ann. § 125.04 16
Wis. Stat. Ann. § 125.04(5)(a)(2) 14, 15
Wis. Stat. Ann. § 125.34(2) 14
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An Interpretation of American Prohibition, 122 (1976).....24

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Raymond B. Fosdick and Albert Scott, *Toward Liquor Control*, Harper & Brothers (1933) 11, 23, 28

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Wet and Dry Counties, NABCA 21

Congressional Record

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INTEREST OF AMICUS CURIAE*

Since 1938, the National Beer Wholesalers Association ("NBWA") has served as the national membership organization of the beer distributing industry representing over 3,000 family-owned independent licensed beer distribution entities. Its members reside in all 50 states and employ over 130,000 individuals.

This case implicates critical interests of NBWA and its members. The Sixth Circuit decision in *Byrd v. Tennessee Wine and Spirit Retailers Association*, 883 F.3d 608 (6th Cir. 2018) threatens to either dismantle or substantially undermine complex state regulatory systems governing alcoholic beverages that have worked remarkably well for over

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* No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than NBWA or its members made a monetary contribution for the brief's preparation or submission. The parties have filed blanket consent waivers with the Court consenting to the filing of all *amicus* briefs.

80 years. Through these delicately balanced and historically tested regulatory schemes, states have addressed several fundamental interests: preventing vertical integration of the industry; inhibiting overly aggressive marketing and consumption; preventing illegal sales to minors; collecting taxes; creating orderly, transparent, and accountable distribution and importation systems; and preventing a recurrence of the problems that led to the enactment of National Prohibition.

Specifically, the *Byrd* decision puts at risk the requirement that all alcoholic beverages sold in a State must be delivered to an in-state wholesaler and sold to the public through an in-state retailer, thereby assuring effective regulation. Wholesalers serve as the essential regulatory gateway through which alcoholic beverages must pass. As the licensed in-state entity subject to effective audit and

enforcement, wholesalers are required to ensure that the suppliers from whom they buy product and the retailers to whom they sell product are fully compliant with all applicable regulatory requirements. Furthermore, wholesalers are obligated to pay excise and other taxes to the State and retain records of their purchases from suppliers and their sales to retailers, thereby creating a transparent and accountable distribution system. They have typically invested millions of dollars in refrigerated warehouses, rolling stock, a sales force, a delivery force, and marketing and promotion funds in order to build the necessary distribution infrastructure in a highly regulated environment. These investments are jeopardized if the industry is deregulated in effect by judicial review and the competitive playing field is tipped against in-state licensees.

The existence of the wholesale tier produces significant efficiencies for suppliers, retailers and the economy by reducing the costs of transporting beer, servicing retailers and providing consumers with a wider range of choices than they would otherwise enjoy.[1] In addition, small suppliers and new market entrants, lacking substantial resources, leverage the wholesalers' infrastructure to create and grow a market for their products. Without this infrastructure, the barriers to vertical integration erected by the three-tier system and the prohibitions embodied in the related tied-house laws, small suppliers would be unable to compete with multinational suppliers. Furthermore, American

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[1] Dr. Bill Latham & Dr. Ken Lewis of the Center for Applied Business & Economic Research at the University of Delaware, *America's Beer Distributors: Fueling Jobs, Generating Economic Growth & Delivering Value to Local Communities*, at 8-13 (2015) (https://www.nbwa.org/resources/economic-impact.).

consumers would not enjoy the unprecedented choice and variety offered by the current regulatory system.[2]

SUMMARY OF ARGUMENT

In a divided decision, the Sixth Circuit Court of Appeals invalidated a Tennessee durational residency requirement for retail liquor licenses on the basis that it violated the dormant Commerce Clause doctrine. However, Tenn. Code Ann.§ 57-3-204 (b) (hereinafter referred to as the "challenged statute") constitutes a key component of Tennessee's comprehensive regulations governing the sale and distribution of liquor within its borders. As such, it is shielded from challenge under that doctrine.

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[2] *See* Testimony of Craig Purser, President, National Beer Wholesaler Association, to the Senate Judiciary Subcommittee on Antitrust, Competition, Policy, and Consumer Rights. (https://www.judiciary.senate.gov/imo/media/doc/12-08-15%20Purser%20Testimony.pdf).

As articulated by the Court in *Granholm v. Heald*, 544 U.S. 460 (2005), state liquor laws which discriminate against out-of-state producers and their products implicate federal interests under the Commerce Clause and are thereby subject to its dormant constraints. On the other hand, state liquor laws, like the challenged statute, which structure a state's liquor distribution system within its borders implicate state interests under the Twenty-first Amendment and are free from such restraints. In this way, the Court struck a delicate balance between the respective federal and state interests and conclusively resolved the conflict between the two constitutional provisions.[3]

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[3] In his dissent, Judge Sutton noted that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause". *Byrd*, 883 F.3d at 631 (Sutton, J. dissenting). While the Commerce Clause still limits "state efforts to regulate activity outside of a State's territorial domain" and prohibits discrimination against producers and their products, the Twenty-first Amendment shields state liquor laws which structure the State's distribution system

ARGUMENT

I. Introduction.

NBWA urges the Court to reverse the Sixth Circuit and uphold the constitutionality of the challenged statute. NBWA's Brief will focus on the pertinent policies underlying Tennessee's liquor regulatory system and the challenged statute, the constitutional history underlying the Twenty-first Amendment as it applies to this case, the holding of the *Granholm* Court which struck an appropriate balance between state authority under the Twenty-first Amendment and federal authority under the Commerce Clause, and the reasons why that holding

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within its borders from Commerce Clause challenge. *Id* at 632-33. On that basis, Judge Sutton would have validated the durational residency statute except as to its application to 100% of a retailer's stockholders and the imposition of a ten-year residency requirement for renewal of a license. *Id.* at 635. Presumably, Judge Sutton felt that the latter two provisions did not pass muster under even the Equal Protection rational basis test.

supports a conclusion that the challenged statute passes constitutional muster.

II. Policy Underlying the Challenged Statute.

Since the dawn of recorded history, alcohol has enriched our culinary experiences, social gatherings, and lives. When abused, however, it has also occasioned great harm. According to the federal government's Centers for Disease Control and Prevention, alcohol contributes to over 88,000 deaths each year in this country, and excessive drinking costs our economy over $224 billion annually.[4] Few, if any, publicly-available products embody a similar potential to create such great societal harm.

Federal, state, and local governments have attempted to mitigate the detrimental impacts of alcohol abuse through regulation of the alcohol

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[4] *Preventing Alcohol Abuse*, Centers for Disease Control and Prevention ("CDC") (https://www.cdc.gov/alcohol/fact-sheets/prevention.htm).

industry and the consumer. Alcohol has always been, and remains, one of the most heavily regulated products in the United States. It is unique in terms of its status in law. It is the only commercial product that has been the subject of two constitutional amendments: the Eighteenth Amendment, which instituted national Prohibition, and the Twenty-first Amendment, which not only repealed Prohibition, but also assigned primary responsibility for alcohol regulation to the states.[5]

All state alcohol regulatory systems strive to achieve moderation in both the consumption and sale of intoxicating liquor. The goal is to create an "orderly" market that balances competition with appropriate control. Three-tier and tied-house laws are the keystones of American alcohol regulation. Pursuant to their plenary authority under the

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[5] U.S. CONST. amends. XVIII, XXI.

Twenty-first Amendment, states regulate alcohol within their respective borders through a three-tier system with licensed and structurally separate producers, wholesalers, and retailers. "Tied-house" laws support a three-tier system by prohibiting suppliers and wholesalers, with narrow exceptions, from providing items of value to or exercising control over or ownership in retailers. The purpose of the system is, in part, to avoid the harmful effects of vertical integration in the industry by restricting these market participants to their respective service functions.[6]

The American historical experience has proven that vertical integration and "tied houses" lead to excessive retail capacity, cutthroat

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[6] As illustrated by the recent Modified Final Judgment entered in the matter of *U.S. v. Anheuser-Busch InBev SA/NV and SABMiller plc*, concerns about vertical integration remain very relevant today. Case No. 1:16-cv-01483-EGS, Doc. 42 (D.D.C. October 22, 2018) (requiring divestiture of certain assets and imposition of safeguards protecting wholesaler independence).

competition for market share, and overstimulated sales which ultimately leads to intemperate consumption.[7] It is widely recognized that prior to prohibition, "tied houses" were a root cause of alcohol abuse and related problems because retailers were pressured to sell product by any means including selling to minors, selling after hours, and overselling to intoxicated customers.[8] This Court has expressly recognized that the three-tier system is "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005).

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[7] In *Toward Liquor Control*, Fosdick and Scott noted that "tied-houses" lead to a "multiplicity of outlets."
Raymond B. Fosdick and Albert Scott, *Toward Liquor Control*, Harper & Brothers, at 43 (1933) (Republished by Center for Alcohol Policy 2011). Federal officials have noted a correlation between the number and density of retail outlets, on the one hand, and consumption patterns and abuse, on the other. *See Preventing Excessive Alcohol Consumption: Regulation of Alcohol Outlet Density*, The Community Guide, CDC, (https://www.thecommunityguide.org/findings/alcohol-excessive-consumption-regulation-alcohol-outlet-density).

[8] These remain a concern of policymakers 'o this day. *See*, for example, *Preventing Excessive Alcohol Consumption*, The Community Guide, CDC (http://www.thecommunityguide.org/alcohol).

In addition to promoting temperance, State regulatory systems have achieved many other benefits for the American public, including unprecedented choice and variety of distilled spirits, wines, and beers. As evidenced by the explosion of craft distilleries, wineries, breweries, and the existence of a strong, independent middle tier, the system nurtures small, entrepreneurial businesses and provides a level playing field on which they can fairly compete. The industry remains one of the last mainstays of family-owned businesses. As a result, alcohol vendors are rooted in their community, more likely to be sensitive to local norms and standards, more likely to be compliant with existing regulations, and more vulnerable to effective enforcement. *See* Michael D. Madigan, *Control Versus Competition: The Courts' Enigmatic Journey in the Obscure Borderland Between the Twenty-first Amendment*

and Commerce Clause, 44:4 Mitchell Hamline L. Rev. (2018)[9].

The three-tier system has been likened to an hour glass. With very limited exceptions, all alcohol sold within a state, regardless of its origin, must be sold through a wholesaler with a physical presence in the state.[10] Beyond physical presence, twenty-

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[9] https://mitchellhamline.edu/law-review/2018/04/06/michael-d-madigan-control-versus-competition-the-courts-enigmatic-journey-in-the-obscure-borderland-between-the-twenty-first-amendment-and-commerce-clause/.

[10] *See* Ala. Code § 28-1-4(b); Ala. Code §§ 28-3A-8 and 28-3A-9; Ariz. Rev. Stat. Ann. § 4-243.01(B); Ark. Code Ann. § 3-5-216; Cal. Bus. & Prof. Code § 24041; Colo. Rev. Stat. Ann. § 44-3-407(1)(d); Conn. Agencies Regs. § 30-6-B9; Del. Code Ann. tit. 4, § 501(f); Fla. Stat. Ann. § 561.5101; Haw. Rev. Stat. Ann. § 281-3; Idaho Code Ann. § 23-1028; 235 Ill. Comp. Stat. Ann. § 5/6-8; Ind. Code Ann. § 7.1-3-3-5(b); Iowa Code Ann. § 123.130(2); Kan. Admin. Regs. § 14-5-6; Ky. Rev. Stat. Ann. § 244.167(1)(d); La. Stat. Ann. § 26:359(A); Me. Rev. Stat. tit. 28A, § 1361(4); Md. Code Regs. § 03.02.01.20; Mass. Gen. Laws Ann. Ch. 138, § 18; Minn. Stat. Ann. § 340A.305; Miss. Code Ann. § 27-71-349(6); Mo. Ann. Stat. § 311.373; Mont. Code Ann. § 16-3-230; 237 Neb. Admin. Code Ch. 6, Sec. 010; Nev. Rev. Stat. Ann. §§ 369.4855 and 369.487; N.H. Rev. Stat. Ann. § 178:16(I); N.J. Admin. Code § 13:2-25.3; N.M. Stat. Ann. § 60-6A-1(B); N.C. Gen. Stat. Ann. § 18B-1113; N.D. Admin. Code § 81-12-01-04; Ohio Admin. Code § 4301:1-1-22(B); Okla. Stat. Ann. tit. 37A, § 3-110(E); 47 Pa. Stat. Ann. § 4-441(g); R.I. Code R. § 11-4-8:4, Rule 19(b)(1); S.C. Code Ann. § 61-4-1100(2)(d); S.D. Codified Laws § 35-4-60.1; Tenn. Code Ann. § 57-5-201(c); Tex. Alco. Bev.

eight states impose a residency requirement upon individuals in order to obtain a wholesaler license.[11] Of the states that impose a residency requirement, sixteen states also impose a durational aspect to that requirement.[12] A number of those states that require

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Code Ann. § 107.06(b); Utah Code Ann. § 32B-13-301(9)(b)(ii); 7 VT Stat. § 63(b); Wis. Stat. Ann. § 125.34(2).

[11] *See* Ariz. Rev. Stat. Ann. § 4-402(A); Ark. Code Ann. § 3-4-606(a); Idaho Code Ann. § 23-304; Iowa Code Ann. §§ 123.3(34), 123,127(2)(b) (residency requirement in definition of "person of good moral character"); Ky. Rev. Stat. Ann. § 243.100(1)(f); La. Stat. Ann. § 26:80(A)(2); Me. Rev. Stat. tit. 28-A, § 1401(5)(A); MD AL BEV § 3-102; Mass. Gen. Laws Ann. Ch. 138, § 18; Mich. Comp. Laws Ann. § 436.1601(1); Miss. Code Ann. § 67-3-21; Mo. Ann. Stat. § 311.060(1); Neb. Rev. Stat. Ann. § 53-125; N.H. Rev. Stat. Ann. § 178:1(III); N.J. Stat. Ann. § 33:1-11.3(containing residency reciprocity requirement for sale to New Jersey retailers); N.M. Stat. Ann. § 60-6B-2(A)(3) (requiring a New Mexico resident that has power of attorney and power to bind applicant related to sales and operations); N.C. Gen. Stat. Ann. § 18B-900(a)(2); N.D. Cent. Code Ann. § 5-03-01(1); Okla Stat. Ann. Tit. 37A, § 2-146(A)(1); 47 Pa. Stat. Ann. §§ 4-410(d) and 4-431(c); 3 R.I. Gen. Laws Ann. § 3-5-10(a)(1); S.C. Code Ann. § 61-6-110(2); Tenn. Code Ann. § 57-3-203 (b)(1); Tex. Alco. Bev. Code Ann. § 6.03(a); Va. Code Ann. § 4.1-223(1) (requiring applicant to establish a place of business within Virginia); W. Va. Code Ann. § 11-16-8(a); Wis. Stat. Ann. § 125.04(5)(a)(2); Wyo. Stat. Ann. §§ 12-1-101(xiii) and 12-2-201(a).

[12] *See* Ark. Code Ann. § 3-4-606(a) (5 year duration); Idaho Code Ann. § 23-304 (6 month durational residency requirement for special wholesalers); Ky. Rev. Stat. Ann. § 243.100(1)(f) (1 year duration); La. Stat. Ann. § 26:80(A)(2) (2 year duration); Me. Rev. Stat. tit. 28-A, § 1401(5)(A) (6 month duration); MD AL

any form of residency extend that requirement to corporate applicants.[13] Finally, some states require

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BEV § 3-102 (2 year duration); Mich. Comp. Laws Ann. § 436.1601(1) (1 year duration); Miss. Code Ann. § 67-3-21 (2 year duration); N.H. Rev. Stat. Ann. § 178:1(III) (3 year duration for liquor and wine representatives); Okla Stat. Ann. Tit. 37A, § 2-146(A)(1) (5 year duration for non-beer wholesalers); S.C. Code Ann. § 61-6-110(2) (30 day duration); Tenn. Code Ann. § 57-3-203 (b)(1) (2 year duration); Tex. Alco. Bev. Code Ann. § 6.03(a) (1 year duration); W. Va. Code Ann. § 11-16-8(a) (4 year duration); Wis. Stat. Ann. § 125.04(5)(a)(2) (90 day duration); Wyo. Stat. Ann. §§ 12-1-101(xiii) and 12-2-201(a) (1 year duration).

[13] *See* Ark. Code Ann. § 3-4-606(a) (5 year duration for each officer, director, manager, or stockholder); Iowa Code Ann. §§ 123.3(34), 123,127(2)(b) (residency requirement extended to each officer, director, partner, and person owning or controlling 10% or more of stock, or with an interest of 10% of more in the ownership or profits of such person); Me. Rev. Stat. tit. 28-A, § 1401(5)(B) (6 month durational business requirement for corporate applicant); MD AL BEV § 3-105(b) (corporate license to be issued to 3 officers as individuals, with at least one of the officers required to be a resident of Maryland for at least 2 years); Mass. Gen. Laws Ann. Ch. 138, § 18 (requiring majority of directors of a corporation to be residents of Massachusetts); Mich. Comp. Laws Ann. § 436.1601(4) (1 year durational residency requirement for all stockholders); Miss. Code Ann. § 67-3-21 (prohibiting granting of a wholesaler's license unless applicant has been a resident for 2 years); Mo. Ann. Stat. § 311.060(3) (3 year durational residency requirement for officers, directors, and 60% of stockholders); N.H. Rev. Stat. Ann. § 178:1(III) (3 year durational residency requirement for at least one officer, director, or partner of corporate applicant for a liquor and wine representatives license); N.J. Stat. Ann. § 33:1-11.3 (prohibiting a foreign person [which, by definition includes a corporation] to sell to New Jersey retailers unless a reciprocal provision exists in the state in which such person is a resident); Okla Stat. Ann. Tit. 37A, § 2-146(A)(1) (5 year durational residency requirement for non-beer wholesalers including, by

a corporate entity to have an appointed agent, manager, or attorney in fact that satisfies residency requirements in order for such entity to receive a wholesaler license.[14] Most states impose similar requirements on retailers.

Tennessee regulates the sale and distribution of alcohol within its borders through a "three-tier system" of licensed and structurally separate producers, wholesalers, and retailers. *See* Tenn. Code Ann., Title 57. A wholesaler must obtain a Federal

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implication, corporate applicants); 47 Pa. Stat. Ann. § 4-431(c)(residency requirement for officers, directors, and 51% of capital stock ownership); 3 R.I. Gen. Laws Ann. § 3-5-10(b)(1) (residency requirement for officers, directors, or stockholders of corporate applicant if corporation has less than 25 stockholders); S.C. Code Ann. § 61-6-110(2) (30 day durational residency requirement for person in control and management of the business); Tenn. Code Ann. § 57-3-203(f) (5 year durational residency requirement for stockholders); Tex. Alco. Bev. Code Ann. § 6.03(k) (1 year durational residency requirement for 51% or more of its stockholders); W. Va. Code Ann. § 11-16-8(a) (4 year durational residency requirement for members, officers, or other persons in active control of the activities of the company); Wyo. Stat. Ann. §§ 12-1-101(xii) and (xiii) and 12-2-201(a) (1 year durational residency requirement for a "person" which includes, by definition, a corporation).

[14] *See* Ariz. Rev. Stat. Ann. § 4-202; Neb. Rev. Stat. Ann. § 53-125; N.M. Stat. Ann. § 60-6B-2(A)(3); N.D. Cent. Code Ann. § 5-03-01; Wis. Stat. Ann. § 125.04.

Basic Permit from the Alcohol and Tobacco Tax and Trade Bureau,[15] a Wholesaler License from the Tennessee Alcoholic Beverage Commission, and an Employee Permit for each employee involved with the delivery and sale of alcohol.[16] The wholesaler is obligated to verify that each of its manufacturers and importers has obtained a Certificate of Label Approval from the Tax and Trade Bureau.[17] The wholesaler must further verify that each manufacturer or importer is duly licensed by Tennessee Alcoholic Beverage Commission, that each

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[15] 27 U.S.C. § 204. The Federal Alcohol Administration Act ("FAAA"), 27 U.S.C. § 201 et seq., itself acknowledges the primacy of state law, at least with respect to malt beverages. *See* 27 U.S.C. § 205 (referred to as the "Penultimate Paragraph" which provides that the tied-house provisions of the FAAA only apply to the extent that state law embodies similar provisions); *see also* 42 U.S.C. § 290bb-25b(b)(7), reauthorized in Public Law 114-255 (2016), Stop Underage Drinking Act ("Alcohol is a unique product and should be regulated differently than other products by the States and Federal Government. States have primary authority to regulate alcohol distribution and sale, and the Federal Government should support and supplement these State efforts.").

[16] Tenn. Code Ann. § 57-3-203 (outlining the requirements for obtaining such a license).

[17] 27 U.S.C. § 205(e).

of their brands are duly registered with the Tennessee Alcoholic Beverage Commission, and that the corresponding brand registration privilege tax has been paid.[18]

In addition, the wholesaler is obligated to pay all applicable excise taxes on the alcohol.[19] Tennessee has the highest beer tax rate in the country.[20] Finally, the wholesaler must verify that each retailer to whom it delivers is duly licensed by the state, is compliant with all applicable regulations, and has remitted all applicable taxes. If the wholesaler sells products in violation of any of these obligations, which exist to facilitate

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[18] Tenn. Code Ann. §§ 57-3-202 & 57-3-301(b).

[19] Tenn. Code Ann. §57-3-303(a). The gross receipt taxes that Tennessee wholesalers collect are paid directly to their host counties and municipalities. They are a very important source of local governmental revenue. *See State Shared Taxes in Tennessee,* Tennessee Advisory Commission on Intergovernmental Relations (https://www.tn.gov/content/dam/tn/tacir/documents/exec.pdf)

[20] *How High Are Beer Taxes in Your State?,* Tax Foundation (https://taxfoundation.org/beer-taxes-state/).

enforcement of state requirements imposed on suppliers and retailers, it is subject to fine, suspension or revocation of its license.

In turn, retailers must also obtain a state retail license as well as an Employee Permit for each employee involved with the delivery and sale of alcohol.[21] They may only purchase alcohol from a Tennessee-licensed wholesaler. They are responsible for and must secure their licensed premise. Tenn. Code Ann. § 57-3-204. The retail premise is specifically defined and must generally be compact and contiguous. The retailer is responsible for strict compliance with all alcohol regulations within the retail premises and furthermore is responsible for collecting and remitting all applicable alcohol sales taxes.

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[21] Tenn. Code Ann. § 57-3-204 (outlining the requirements for obtaining such a license).

It would be virtually impossible for the Tennessee Alcoholic Beverage Commission to regulate effectively over 640,000 alcohol retailers scattered across the country[22] without a regulatory system that funneled all alcohol being sold in the state through in-state wholesalers and retailers who were subject to audit, control, and enforcement action by the Tennessee Alcoholic Beverage Commission. Similarly, it would be virtually impossible to collect the millions of dollars of taxes levied on alcohol sales without such a system. In short, there would be no accountable, transparent and orderly alcohol distribution market without a three-tier system.

In Tennessee, alcohol may only be sold by local option. Tenn. Code Ann. §§ 57-3-102 & 57-3-103. Of the 96 counties in Tennessee, 24 still prohibit the

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[22] *2017 Beer Industry in Review*, NBWA (https://www.nbwa.org/resources/2017-beer-industry-review).

sale of alcohol.[23] This evidences the wide divergence of opinion among Tennessee citizens regarding this socially sensitive product. It also explains the desire and intent of its policymakers to accommodate local norms and standards in the establishment of effective alcohol regulation.

In deference to this deep divide in public opinion regarding alcohol, a retail license may only be issued to a Tennessee resident who has satisfied the durational residency requirement. The reasons for that requirement are expressed in Tenn. Code Ann. § 57-3-204 (b) (4):

> It is the intent of the general assembly to distinguish between licenses authorized generally under this title and those specifically authorized under this section. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in

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[23] *Wet and Dry Counties*, NABCA (https://www.nabca.org/sites/default/files/assets/publications/white_papers/WetDry%20Counties.pdf).

> wine or beer, as defined in § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

A statute that requires durational residency ensures that the applicant has a demonstrated commitment to the host community, an understanding of its local norms and standards, and a thorough knowledge of the applicable state and local laws governing the sale of alcohol. *Southern Wine & Spirits of America, Inc. v. Division of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013) (upholding a durational residency requirement on the officers and owners of a corporate wholesaler

licensee); *see* Raymond B. Fosdick and Albert Scott, *Toward Liquor Control*, Harper & Brothers, at 43 (1933).

III. The Congressional and Constitutional History of Liquor Regulation.

The congressional and constitutional history of alcohol illustrates the intent to safeguard the States' authority to regulate alcohol within their borders free from the dormant constraint of the Commerce Clause.

A. The Eighteenth Amendment.

Alcohol regulation was minimal in the nineteenth century.[24] In that era, America was characterized as "a nation of drunkards."[25] Temperance movements, such as the Woman's Christian Temperance Union and Anti-Saloon

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[24] *See* Jane O'Brien, *The Time When Americans Drank All Day Long*, BBC NEWS (Mar. 9, 2015), http://www.bbc.com/news/magazine-31741615.

[25] W.J. Rorabaugh, *The Alcoholic Republic: An American Tradition* 5 (1979).

League, arose to address the problem.[26] Initially, these prohibition advocates pursued local option laws that permitted localities to ban the sale of alcohol and close tied-house saloons.[27] Thereafter, they sought similar measures statewide.[28] By the end of 1916, twenty-three states banned the sale of alcohol.[29]

As the nation grew, companies engaged in interstate commerce began challenging state statutes that barred the sale of alcohol. In the late nineteenth century, the United States Supreme Court substantially limited the authority of states to regulate liquor importation under the dormant Commerce Clause doctrine.[30]

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[26] *Id.* at 187-222.

[27] Norman H. Clark, *Deliver Us From Evil: An Interpretation of American Prohibition*, 122-27 (1976).

[28] *Id.*

[29] *Id.* at 97 (1976).

[30] *See, e.g., Leisy v. Hardin*, 135 U.S. 100, 159–60 (1890) (holding that intoxicating liquor shipped into the state remained an article of "interstate commerce" immune from

These decisions frustrated the efforts of prohibition advocates and prompted a petition to Congress. In response, Congress passed the Wilson Act, 27 U.S.C. § 121 (1890), in order to safeguard a state's right to regulate alcohol, including the importation of alcohol into the state.[31] The Wilson Act provided that state law applied to the sale, distribution, and transportation of intoxicating liquor upon its arrival in the state. *Id.* In *Rhodes v. Iowa*, however, the Supreme Court held that the dormant Commerce Clause doctrine prohibited state regulation of direct shipments of alcohol to in-state consumers by out-of-state companies, effectively gutting the Wilson Act.[32] As a result, train stations

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state regulation if it remained in its original package); *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 500 (1888) (striking down a state law that restricted the importation of intoxicating liquor to those who possess a permit).

[31] *See* Note, *"Police Power" Under the Wilson Act of 1890*, 19 HARV. L. REV. 53, 53–54 (1905).

[32] 170 U.S. 412, 426 (1898).

began to function as retail outlets.[33] In response, Congress passed the Webb-Kenyon Act, 27 U.S.C. § 122 (1913), which authorized states to prohibit the sale, distribution, transportation, or importation of alcohol into the state in violation of its laws.[34]

Congress passed these two acts in direct response to the Supreme Court decisions that limited state authority to regulate liquor.[35] This unequivocally demonstrates the intent of Congress to make state law primary regarding the regulation of alcohol.[36] The risk that state legislation may burden interstate commerce was overridden by the desire to

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[33] *See* Jason E. Prince, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment*, 79 NOTRE DAME L. REV. 1563, 1575 (2004).

[34] *See* 49 CONG. REC. 4292 (1913). In vetoing the bill, President Taft described it as permitting "the states to exercise their old authority, before they became states, to interfere with commerce between them and their neighbors." *Id.*

[35] *See Granholm v. Heald*, 544 U.S. 460, 502–03 (2005) (Thomas, J., dissenting).

[36] *See, e.g., Dugan v. Bridges*, 16 F. Supp. 694, 704 (D.N.H. 1936); 49 CONG. REC. 2687 (1913).

respect local standards and ensure effective state regulation of liquor.[37] The constitutionality of the Webb-Kenyon Act was upheld in 1917 in *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311, 332 (1917).

Flushed with success in the states and the passage of the Webb-Kenyon Act, temperance advocates then focused their efforts on a nationwide ban on the sale of alcohol. In 1917, Congress passed the Wartime Prohibition Act (grain and barley were needed for the war effort).[38] Thereafter, prohibition advocates pursued adoption of the Eighteenth Amendment, an effort that required two-thirds majority vote in both the House and Senate and a subsequent affirmative vote by three-fourths of the

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[37] *See Dugan*, 16 F. Supp. 694 at 704.

[38] *See generally* Sidney J. Spaeth, *The Twenty-first Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 175 (1991)

states.[39] Only two states, Connecticut and Rhode Island, refused to ratify the Amendment.[40] Prohibition took effect on January 16, 1920.[41]

Prohibition proved to be a noble but failed experiment and was largely responsible for the rise of organized crime and a nationwide disregard for the law.[42] There were two lessons learned from Prohibition. First, morality-driven legislation was difficult to sustain without long-term support.[43] Second, disparate community norms and standards

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[39] *See* Thomas Pinney, *A History of Wine in America: From the Beginnings to Prohibition* 434 (1989).

[40] *Id.*

[41] Spaeth, *supra* note 38, at 175.

[42] *See, e.g., Loretto Winery, Ltd. v. Gazzara*, 601 F. Supp. 850, 856 (S.D.N.Y. 1985); Nora v. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613, 621 (1994).

[43] *See* John D. Rockefeller, *Foreword* in Raymond Fosdick and Albert Scott, *Toward Liquor Control* (1933) ("Men cannot be made good by force. In the end, intelligent lawmaking rests on the knowledge or estimate of what will be obeyed. Law does not enforce itself.").

for alcohol precluded the imposition of a single, national regulatory standard.[44]

B. The Twenty-first Amendment.

Enacted in 1933, the Twenty-first Amendment embodied the recognition that Americans did not accept a national policy that prohibited the manufacture and sale of alcoholic beverages. U.S. CONST. amend. XXI. Noble motives alone failed to achieve prohibition and undermined the public's belief in the rule of law. The Twenty-first Amendment shifted the regulation of liquor to the level of government able to obtain broad support.[45] State, not national, regulation assumed the primary role. The ratification of the Twenty-first Amendment embedded in the Constitution the policy underlying

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[44] *See National Prohibition Law: Hearings Before the S. Comm. on the Judiciary, Subcomm. on Bills to Amend the National Prohibition Act*, 69th Cong. 197 (1926).

[45] *See* David S. Versfelt, Note, *The Effect of the Twenty-first Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1578 (1975).

the Webb-Kenyon Act; that is, state authority was primary regarding the regulation of alcohol.

Section 2 of the Twenty-first Amendment erected a constitutional barrier to invalidation under the Commerce Clause of state alcohol regulation regarding importation, transportation, and distribution within a state. U.S. CONST. amend. XXI, § 2. The Section "[g]rants the States virtually complete control over whether to permit importation or sale of liquor, and how to structure the liquor distribution system." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

As originally proposed, Section 3 of the Twenty-first Amendment conferred upon Congress concurrent power to regulate alcohol sales, but that language was not adopted.[46] Senators Blaine and

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[46] *See* Spaeth, *supra* note 38, at 180.

Wagner objected to the section, explaining that the concept of concurrent power was inconsistent with the state power conferred under Section 2.[47] The intent of the Twenty-first Amendment and the Webb-Kenyon Act was not to encourage state legislation that burdened interstate commerce but rather to insulate states from federal interference with local norms and standards. *See Granholm v. Heald*, 544 U.S. 460, 525 (2005) (Thomas, J., dissenting). State authority over the regulation of alcohol was deemed paramount. *See United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 300 (1945) (Frankfurter, J., concurring).

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[47] *See* Spaeth, *supra* note 38, at 181-82. States desiring to remain dry after repeal feared that concurrent power would allow Congress to overrule a state's choice to remain dry.

C. The Twenty-first Amendment and Dormant Commerce Clause.

1. The Early Cases.

Endorsed by both Congress and state constitutional conventions, the Twenty-first Amendment was not just a narrow delegation of federal regulatory authority. The express language of the Amendment exclusively conferred on the states the authority to regulate the "transportation or importation" of intoxicating liquors, without limitation, and without rendering states subservient to federal power under the Commerce Clause.

Shortly after the Twenty-first Amendment was enacted, the Supreme Court recognized the broad authority that the Twenty-first Amendment conferred upon the states in the area of alcohol regulation.

> The Twenty-first Amendment sanctions the right of a state to legislate concerning

> intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them.

See, e.g., Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939) (upholding a regulation on the exportation of alcoholic beverages out of the state).

The early cases specifically upheld the states' power to regulate intoxicating liquor even when it clearly burdened interstate commerce. The justification was that the control of importation is an essential component of the states' licensing and regulatory authority, and the Twenty-first

Amendment insulates this authority from a dormant Commerce Clause challenge.[48]

State regulation of intoxicating liquor, however, was not necessarily free from all constitutional limitations. As noted in *Granholm*, "the Court has held that state laws that violate other provisions [than the Commerce Clause] of the Constitution are not saved by the Twenty-first Amendment. *Granholm*, 544 U.S. at 486-87.[49]

Clearly, the Twenty-first Amendment was intended to limit application of the Commerce Clause

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[48] *See Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939), *abrogated by Granholm v. Heald*, 544 U.S. 460 (2005); *Finch v. McKittrick*, 305 U.S. 395, 397 (1939), *abrogated by Granholm v. Heald*, 544 U.S. 460 (2005).

[49] *See, e.g. 44 Liquor Mart, Inc. v. Rhode Island*, 517 U.S. 484, 514–16 (1996) (deciding the Twenty-first Amendment does not sanction violations of the First Amendment); *Larkin v. Grendel's Den*, 459 U.S. 116, 120–27 (1982) (recognizing an alcohol zoning decision violated the Establishment Clause); *Craig v. Boren*, 429 U.S. 190, 206 (1976) (holding the Twenty-first Amendment does not limit a claim under the Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433, 434 (1971) (deciding the Twenty-first Amendment does not limit the Due Process Clause when the Government seeks to publicly post a one-year restriction on the consumption of alcohol for a citizen).

to state liquor laws to at least some extent. Prior to 1984, the only state liquor statutes which had been declared invalid as violative of the Commerce Clause were those which were extraterritorial in effect[50] or which were preempted by conflicting federal law. The *Bacchus*[51], *North Dakota*,[52] and *Granholm*[53] cases discussed below highlight the subsequent evolution of jurisprudence in this area and the Court's achievement of a balance between state authority under the Twenty-first Amendment and federal authority under the Commerce Clause.

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[50] *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 343 (1989) (striking down a price affirmation statute with extraterritorial effect); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582–85 (1986) (striking down a N.Y. pricing statute that, in effect, controlled the process of intoxicating liquor in neighboring states).

[51] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

[52] *North Dakota v. U.S.* 495 U.S. 423 (1990).

[53] *Granholm v. Heald*, 544 U.S. 460, 466 (2005).

2. Bacchus, North Dakota, and Granholm.

In *Bacchus Imports, Ltd. v. Dias*, the Court addressed the authority of the state to differentiate between in-state and out-of-state producers in a manner that benefited the former and discriminated against the latter. 468 U.S. 263, 265 (1984). The case involved a Hawaii tax on all intoxicating liquors except two locally produced products, ti root brandy and pineapple wine. *Id.* The Court held the Hawaii tax was unconstitutional on the basis that it "favor[ed] local liquor industries" and therefore was preempted by the "strong federal interest in preventing economic Balkanization." *Id.* at 276. The Court indicated that the dormant Commerce Clause doctrine prohibited States from favoring "local liquor industries by erecting barriers to competition." *Id.* Significantly, the relevance of the Webb-Kenyon Act

was never argued to the Court. *Id.* Hawaii did not even raise the Twenty-first Amendment as a defense until it submitted its final brief to this Court. Reply Brief for Appellants, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (No. 82-1565), 1983 U.S. S. Ct. Briefs LEXIS 597, at *5. The majority opinion found this "belated" argument unconvincing. *See Bacchus*, 468 U.S. at 276.

In the 1990 decision of *North Dakota v. U.S.*, 495 U.S. 423 (1990), the Court, in a plurality opinion, reaffirmed that states have "virtually complete control" over "the importation and sale of liquor and the structure of liquor distribution system" within their borders. *Id.* at 431 (involving a positive Commerce Clause challenge) (citations omitted). Because the two challenged North Dakota regulations requiring the purchase from physically present licensed wholesalers fell "within the core of

the State's power under the Twenty-first Amendment", the Court held that the regulations were "supported by a strong presumption of validity and should not be set aside lightly." *Id* at 433 (citing *Capital Cities* 467 U.S. at 714). As such, the regulations were shielded from preemption under the Supremacy Clause.

In 2005, the Court in a 5 to 4 decision again addressed the issue of whether and to what extent state liquor laws were subject to a dormant Commerce Clause challenge. *Granholm v. Heald*, 544 U.S. 460, 466 (2005). The Court first considered whether the challenged New York and Michigan laws, which permitted in-state wineries from shipping direct but prohibited out-of-state wineries from doing so, discriminated between in-state and out-of-state wineries in a manner that benefited the former and burdened the latter. *Id.* at 472–75. The

Court concluded that the direct shipping laws granted in-state wineries access to each State's consumers on preferential terms. *Id.* at 466. ("[T]he object and effect of the laws are the same: to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at the least, to make direct sales impractical from an economic standpoint."). Accordingly, the Court had "no difficulty" concluding that the New York and Michigan laws discriminated against interstate commerce. *Id.* at 474–76.

The Court then addressed the reach of the Twenty-first Amendment, specifically whether the "state alcohol [regulations were] limited by the nondiscrimination principle of the Commerce Clause." *Id.* at 487 (alteration in original) (citing *Bacchus*, 468 U.S. at 276). It began its analysis by noting that it had previously held that the Twenty-

first Amendment does not save state liquor laws that violate other provisions of the Constitution.

The Court then considered the central issue in the case: whether state liquor laws were subject to dormant Commerce Clause challenge, or whether the Twenty-first Amendment provided states with the authority to pass non-uniform liquor laws and discriminate against out-of-state producers and their products. *See Granholm*, 544 U.S. at 484–85. To answer the inquiry, the Court examined the legislative history of the Wilson Act, the Webb-Kenyon Act, and the Twenty-first Amendment. *Id.* The Court concluded that Section 2 of the Amendment was only intended to confer upon states the immunity as provided by Wilson and Webb-Kenyon, and Section 2 and the two acts were not intended to insulate all state liquor laws from the nondiscrimination principle embodied in the

Commerce Clause. *See id.* Therefore, certain facially discriminatory laws which implicated federal interests would only be upheld if they met the rigorous dormant Commerce Clause test; namely, the challenged laws would only be upheld if they advanced legitimate state interests "that cannot be adequately served by reasonable nondiscriminatory alternatives." *See id.* at 489.[54]

In *Granholm*, the laws in question, which discriminated against out-of-state producers, could not meet this rigorous test and, accordingly, were struck down as violative of the dormant Commerce Clause doctrine. *See id.* at 493. The Court, however,

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[54] Justice Kennedy's opinion in *Granholm v. Heald* 540 US 460 (2005) references the purported existence of a "Model Direct Shipping Bill" attributed to the National Conference of State Legislatures (NCSL). *Id.* at 491. Justice Kennedy proffered this model bill as some form of "least restrictive alternative" to the challenged statutes. However, there is no NCSL Model Bill. (http://www.ncsl.org/ncsl-in-dc/standing-committees/communications-financial-services-and-interstate-commerce/memo-regarding-model-wine-shipping-bill.aspx).

was careful to include language outlining the limits of its decision:

> The States argue that any decision invalidating their direct shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate." State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

Id. at 488–89 (citations omitted).

Of particular note are the last three sentences of the above-quoted paragraph where the Court limited its decision to discrimination "*in favor of local producers.*" *Id.* at 489 (emphasis added). The Court further highlighted this limitation by noting that "[w]ithout demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage *out-of-state . . . producers.*" *Id.* at 493 (emphasis added).

This carefully chosen language illustrates the Court's attempt to balance the federal interest in interstate commerce under the Commerce Clause with the state's interest in controlling importation and structuring the liquor distribution system with its borders under the Twenty-first Amendment. Discriminating against *out-of-state producers* and their products implicated Congress' Commerce power. *See id.* at 489. Structuring a distribution

system *within its borders* implicated the states' Twenty-first Amendment power. *Id.* The Court thus inferred that this distinction would determine the reach of the dormant restraints of the Commerce Clause.

Accordingly, *Granholm* upheld the paramount authority of states to regulate wholesalers and retailers within their borders free from the constraints of the Dormant Commerce Clause doctrine. *Id.* at 488–90. Any other interpretation of *Granholm* renders the Amendment essentially meaningless.

3. Arnold's Wines, Brooks, and Southern Wine.

The Second, Fourth, and Eighth Circuits have adopted and applied this interpretation of the *Granholm* decision. In *Arnold's Wines*, an Indiana retailer challenged a New York law that prohibited

unlicensed, out-of-state retailers from selling and delivering alcohol directly to New York consumers. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 186–87 (2d Cir. 2009). The Second Circuit Court of Appeals noted that the case required it "to chart a course between two constitutional provisions that delineate the boundaries of a state's power to regulate commerce:" namely, the Twenty-first Amendment and the Commerce Clause. *Id.* at 186.

The *Arnold's Wines* court discussed the *Granholm* decision at length. *See id.* at 189–92. Reconciling the constitutional conflict, the Second Circuit noted the following:

> *Granholm* is best seen as an attempt to harmonize prior Court holdings regarding the power of the states to regulate alcohol within their borders—a power specifically granted to the states by the Twenty-first Amendment—with the broad policy concerns of the Commerce Clause. *Granholm* validates evenhanded state policies regulating the importation and distribution of alcoholic

> beverages under the Twenty-first Amendment. It is only where states create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the Commerce Clause.

Id. at 190 (citations omitted).

Relying upon the *Granholm* conclusion that the three-tier system is "unquestionably legitimate," the *Arnold's Wines* court unanimously upheld the challenged law on the basis that the Twenty-first Amendment conferred upon New York the authority to structure the distribution system within the state as it saw fit. *Id.* at 190–91.

The Fourth Circuit Court of Appeals also considered similar issues. *Brooks v. Vassar*, 462 F.3d 341, 344 (4th Cir. 2006). The case involved the Virginia Personal Import Exception[55] to the three-tier system that limited the amount of wine and beer

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[55] Va. Code Ann. § 4.1-310 (2007).

that Virginia consumers could personally transport into the state for their personal consumption. The court rejected the argument that this discriminated against out-of-state retailers and violated the dormant Commerce Clause doctrine. *See id.* at 352. Judge Niemeyer noted that "an argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself." *Id.*

Similarly, *Southern Wine & Spirits of America, Inc. v. Division of Alcohol & Tobacco Control* 731 F.3d 799, 802 (8th Cir. 2013) involved a dormant Commerce Clause challenge to a Missouri statute regulating wholesalers. 731 F.3d 799, 802 (8th Cir. 2013). The Missouri law embodied a

durational residency requirement for corporate liquor wholesalers and their majority owners, directors, and officers. *See id.* at 802–03. Southern Wine and Spirits of America, Inc. was denied a Missouri liquor wholesaler license on the basis that it was a Florida-based corporation. *See id.* at 803. The Eighth Circuit framed the central issue in the case as follows: "whether the residency requirement applicable to the wholesale tier of Missouri's liquor distribution system, which is otherwise impermissible under Commerce Clause jurisprudence, is authorized by [Section] 2 of the Twenty-first Amendment." *Id.* at 807 (alteration in original).

Citing *Granholm*, the Eighth Circuit held that "state policies that define the structure of the liquor distribution system while giving equal treatment to in-state and out-of-state liquor products and

producers are 'protected under the Twenty-first Amendment.'" *Id.* at 809 (citing *Granholm*, 544 U.S. at 489). The court rejected *Southern Wine*'s argument that only "integral" aspects of the three-tier system were immune from Dormant Commerce Clause challenge and that a residency requirement was not such an integral component. *See id.* at 810. In the court's view, "[t]here is no archetypal three-tier system," and states are free under the Twenty-first Amendment to structure that system as they see fit. *Id.* Upholding the statute, writing for the court, Judge Colloton articulated the public policy underlying Missouri's residency requirement as follows:

> The legislature legitimately could believe that a wholesaler governed predominantly by Missouri residents is more apt to be socially responsible and to promote temperance, because the officers, directors, and owners are residents of the community and thus subject to negative externalities—

> drunk driving, domestic abuse, underage drinking—that liquor distribution may produce. Missouri residents, the legislature sensibly could suppose, are more likely to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter day-today in ballparks, churches, and service clubs. The legislature logically could conclude that in-state residency facilitates law enforcement against wholesalers, because it is easier to pursue in-state owners, directors, and officers than to enforce against their out-of-state counterparts.

Id. at 811.

The challenged statute sets forth the requirements that an applicant for a Tennessee retail license must satisfy. It is a component of Tennessee's liquor distribution system within the state. As such, the statute falls within the state's "core concerns" or "core powers" under the Twenty-first Amendment and is free from the constraints established by the dormant Commerce Clause

doctrine. *See Granholm*, 544 U.S. at 488-89 (quoting *Midcal Aluminum, Inc.*, 445 U.S. at 100).[56]

As noted by Judge Colloton with respect to a similar Missouri statute:

> The residency requirement defines the extent of in-state presence required to qualify as a wholesaler in the three-tier system. . . . If it is beyond question that States may require wholesalers to be "in-state" without running afoul of the Commerce Clause, *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (internal quotation omitted), then we think States have flexibility to define the requisite degree of "in-state" presence to include the in-state residence of wholesalers' directors and officers, and a super-majority of their shareholders.

Southern Wine, 731 F.3d at 810-11.[57] The challenged statute does not differentiate between in-state or out-

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[56] The Fifth Circuit also adopted this interpretation of *Granholm*. *See Wine Country Gift Baskets.com vs. Steen*, 612 F.3d 809, 821 (5th Cir. 2010) ("*Granholm* prohibited discrimination against out-of-state *products* or *producers*. Texas has not tripped over that bar by allowing in-state *retailer* deliveries."); *but see Cooper v. Texas Alcoholic Beverage Commission*, 820 F.3d 730 (5th Cir. 2016). The *Cooper* decision can perhaps be best understood as the attempt by one divided panel of the Fifth Circuit to reconcile a 22-year-old precedent and long-standing injunction with the evolving Twenty-first Amendment jurisprudence.

of-state producers or products. It simply requires corporate alcohol retailers and their majority owners, directors, and officers to be residents of the state. As such, the requirement is protected by the Twenty-first Amendment and Respondents' dormant Commerce Clause challenge fails.

IV. State Liquor Laws Structuring the Distribution System Within the State's Borders are Entitled to Extraordinary Deference Under the Twenty-first Amendment.

As noted by Judge Calabresi in his concurring opinion in *Arnold's Wines*, "[t]he evolving interpretation of the Twenty-First Amendment raises important questions about the role of courts." *Arnold's Wines, Inc.*, 571 F.3d at 197. Judge Calabresi warned against the dangers of judicial

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[57] While there may be a split among the Circuits regarding durational residency requirements applicable to retailers, there is no split regarding durational residency requirements applicable to wholesalers.

interpretation designed to "update" what some view as anachronistic laws, particularly when those laws are embedded in the Constitution. *See id.* at 197–201.

> It may permit courts, especially well-meaning ones, to substitute their own notions of modern needs for those of the majority. Moreover, when a rereading results in the erection of a constitutional barrier, it may remove serious issues from the democratic process and from legislative deliberation. . . . Additionally, this sort of updating presents another problem, and one that is especially apparent in the context of the Twenty-First Amendment: It can leave state legislatures and lower federal courts with no firm understanding of what the law actually is.

Id. at 200 (citations omitted).[58]

Justice Frankfurter, in *Carter v. Virginia*, 321 U.S. 131, 142 (1944) warned of similar dangers:

> "It is now suggested that a State must keep within "the limits of reasonable necessity,"

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[58] There have been over 1,700 amendments to state liquor laws in just the past six years. ***State-Level Alcohol Laws Face A Federal Challenge in the Supreme Court,*** Leonine Public Affairs (http://www.leoninepublicaffairs.com/focus/state-level-alcohol-laws-face-federal-challenge-supreme-court/)

and that this Court must judge whether or not Virginia has adopted "regulations reasonably necessary to enforce its local liquor laws." Such canons of adjudication open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which led first to the Eighteenth and then to the Twenty-first Amendment... Less than six years ago this Court rejected the impossible task of deciding, instead of leaving it for legislatures to decide, what constitutes a "reasonable regulation" of the liquor traffic...And since Virginia derives the power to legislate as she did from the Twenty-first Amendment, the Commerce Clause does not come into play."[59]

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[59] Multiple circuit courts likewise recognize the dangers of a federal court acting as a state legislature on alcohol issues. As Judge O'Scannlain has identified, "the district court's suggestion that the State should serve its interest in some other way disparages the policy choices that Section 2 of the Twenty-First Amendment commits to the states." *Costco v. Hoen*, 522 F.3d 874, 903, n. 25 (9th Cir. 2008). In a well-crafted concurring opinion, Judge Hamilton expresses his view as follows: "In my view of the applicable law, the Twenty First Amendment to the Constitution should foreclose balancing tests when the state is exercising its core Twenty-First Amendment power to regulate the transportation and importation of alcoholic beverages for consumption in the state." *Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455, 462 (7th.Cir. 2012) (J. Hamilton concurring). Judge Southwick has articulated that "regulating alcoholic beverage retailing is largely a State's prerogative." *Wine Country*, 612 F.3d at 820. Judge Colloton similarly noted that "there is no archetypal three-tier system from which the 'integral' or 'inherent' elements of that system may be gleaned. States have discretion to establish their own

The intersection of the Twenty-first Amendment and dormant Commerce Clause doctrine may lure courts too far down the road of policymaking under the guise of judicial review. The need for caution in the exercise of judicial review is particularly critical concerning alcohol regulations for two reasons.

First, by its nature, all alcohol regulation fundamentally represents a balance between unfettered competition and availability, on the one hand, and strict control, on the other. Competition implicates federal interests under the Commerce Clause. Control implicates State interests under the Twenty-first Amendment. State Legislatures, according to local norms and standards, must determine how that balance should be achieved and where the appropriate balance point should be fixed.

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versions of the three-tier system[.]" *Southern Wine*, 731 F.3d at 810.

That subjective judgment, forged within the give and take of the political arena, by the community's local, elected representatives, should not be lightly set aside. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (equal protection challenge). Second, these particular legislative judgments enjoy a special status by virtue of the Twenty-first Amendment and, accordingly, are entitled to the greatest deference by any reviewing Court.

The tumultuous history of liquor regulation should serve as a warning to courts against traveling too far down the road of policymaking under the guise of judicial review. Incrementally invalidating key provisions of a state's liquor regulatory scheme can lead to unintended consequences by pulling a thread that threatens to unravel the entire regulatory fabric. It can also undermine or perhaps

even cripple the ability of the state to effectively regulate the industry.

The judgment of the Tennessee Legislature to require durational residency for a retail license falls within its Twenty-first Amendment authority. While other policymakers might draw that line differently, NBWA suggests that the courts should allow different legislatures to construct or deconstruct liquor regulations in their states on an incremental basis as each sees fit.

CONCLUSION

For the foregoing reasons, NBWA respectfully requests that the Court reverse the Sixth Circuit decision and uphold the constitutionality of the challenged statute.

Respectfully Submitted,

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